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No. 97-198

IN THE

Supreme Court of the United States

October Term, 1997

CORNELL D.M. JUDGE CORNISH,

Petitioner,

VS.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF FOR DISTRICT OF COLUMBIA COURT OF APPEALS AND DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY IN OPPOSITION

*Leonard H. Becker
Bar Counsel

Michael S. Frisch
Senior Assistant Bar Counsel

Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

**Counsel of Record for Respondents District of Columbia Court of Appeals and District of Columbia Board on Professional Responsibility*

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QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly imposed the reciprocal discipline of a disability suspension upon Petitioner, based upon an order of the Maryland Court of Appeals directing his placement on inactive status in the Maryland Bar on the ground of a medical disability.

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OPINION BELOW

The judgment of the District of Columbia Court of Appeals, directing Petitioner's disability suspension with leave to seek reinstatement (Pet. App. 11a), is reported at 691 A.2d 156.

JURISDICTION

The judgment of the court of appeals for which review is sought was entered March 27, 1997. Petitioner filed a motion for reconsideration, which the court denied by order entered May 6, 1997 (Pet. App. 15a). Petitioner filed his petition for a writ of certiorari on or about August 1, 1997. Jurisdiction is asserted under various provisions of Title 28 of the United States Code.

STATUTES and RULES

The pertinent statute conferring jurisdiction on the court of appeals to discipline members of its Bar and relevant rules of procedure prescribed by the court of appeals are set out in an Appendix to this brief.

STATEMENT OF PROCEEDINGS BELOW

Petitioner is a member of the Bar of the District of Columbia Court of Appeals, having been admitted on motion on November 4, 1982. He also is a member of the Bar of Maryland. On December 4, 1995, he was placed on inactive status on consent by order of the Court of Appeals of Maryland (the "Maryland Court"). *Attorney Grievance Commission v. Cornish*, Miscellaneous Docket (Subtitle BV) No. 39 (Sept. Term, 1995) (Pet. App.1a).[1]

The order placing Petitioner on inactive status was reported to the District of Columbia Court of Appeals. On April 15, 1996, the court entered an order suspending Petitioner pursuant to D.C. App. R. XI, § 11(d) (Pet. App. 5a). The court directed the Board on Professional Responsibility (the "Board") to recommend promptly whether reciprocal discipline should be imposed or whether the Board, instead, elected to proceed *de novo*. The court also denied Petitioner's motions to amend the order to reflect his change of name and to permit him to remove his name voluntarily from the register of attorneys admitted to practice in the District of Columbia.[2]

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[1] Throughout the proceedings below, Petitioner is referred to as the "Respondent."

[2] Petitioner unsuccessfully challenged the court of appeals' order of interim suspension by petition for writ of certiorari, which this Court de-

On July 12, 1996, the Board filed its report, recommending that the court of appeals impose reciprocal discipline of an indefinite disability suspension, with reinstatement conditioned upon a showing of fitness pursuant to D.C. App. R. XI, § 13(e) (Pet. App. 37a).[3] On March 27, 1997, the court entered its judgment, adopting the Board's report and recommendation.[4]

ARGUMENT

1. The judgment of the court of appeals plainly is correct and does not warrant this Court's review. The record in Maryland demonstrated that Petitioner was the subject of a complaint concerning the handling of a patent application. Petitioner admitted that he suffered lasting effects from surgery and participated in Al Anon. He further admitted that he was unable to cope with the demands of law practice and had no wish to do so. Maryland Bar Counsel and Petitioner agreed that Petitioner should be placed on inactive status (Pet. App. 23a).

Under D.C. App. R. XI, § 11(b), the Maryland Court of Appeals is deemed a disciplining court, with authority to suspend or disbar attorneys admitted to its bar. *In re Webster*, 661 A.2d 144 (D.C. 1995). *See* D.C. App. R. XI, §11(a). The Maryland rules equate orders of suspension and disbarment with orders placing attorneys on inactive status. Md. Rule BV 13a1. In either event, the Clerk of the Maryland Court "shall strike the name of the attorney from the register. . . ." The burden is on Petitioner to terminate his inactive status. Rule BV 14. Thus, the

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nied on October 7, 1996. *Cornish v. District of Columbia Court of Appeals*, No. 96-161.

[3] The text of Section 13 is reprinted at Pet. App. 25a.

[4] Under the terms of the court's order, Petitioner has been eligible to apply for reinstatement in the District of Columbia since July 29, 1997, one year from the date on which he filed an affidavit complying with the provisions of D.C. App. R. XI, § 14. As of the date of filing of this brief in opposition, Petitioner has not filed a petition seeking such reinstatement.

Maryland order constitutes discipline for purposes of D.C. App. R. XI. *In re O'Brien*, 665 A.2d 662 (D.C. 1995) (per curiam); *In re Samuels*, 648 A.2d 943 (D.C. 1994) (per curiam).

Reciprocal *(i.e.,* identical) discipline is imposed in the District of Columbia unless the attorney demonstrates, by clear and convincing evidence, that one or more of the exceptions enumerated in Rule XI applies. D.C. App. R. XI, § 11(c). Here, Maryland followed a procedure similar to that prescribed in D.C. App. R. XI, §§ 13(b) & (c). While under investigation for misconduct, Petitioner sought and was granted inactive status. The Maryland Court concluded that Petitioner's health problems mandated inactive status.

In an original case arising under D.C. App. R. XI, § 13, a disability suspension would be appropriate on this record. *See In re Samuels, supra.* With due deference to Maryland's determination to place Petitioner on inactive status for health reasons, reciprocal discipline is appropriate. *In re Gardner*, 650 A.2d 693 (D.C. 1994); *In re Zilberberg*, 612 A.2d 832 (D.C. 1992); *In re Velasquez*, 507 A.2d 145 (D.C. 1986) (per curiam) (articulating standard of deference to foreign jurisdiction's factual findings in reciprocal discipline matters).

2. Petitioner's principal complaint appears to be that the court below somehow has seized his "famous common law mark," to wit, his name as formally amended to include "Judge" (Pet. 6-8). The court recognized the formal proceeding that had eventuated in Petitioner's change of name and amended the formal caption of the disciplinary proceeding to give full effect to the change. 691 A.2d at 157 n.1 (Pet. App. 11a). The court's order constrains Petitioner in the use of his name as an incidental effect of his disability suspension from the practice of law in the District of Columbia, but that constraint, without more, does not present any viable federal constitutional or statutory issue warranting this Court's review.

3. Petitioner also appears to complain of the Maryland Court's order, maintaining that he rejected the joint petition tendered by the Maryland Attorney Grievance Commission, upon which the Maryland Court rested its determination of inactive status (Pet. 10). Whatever right Petitioner might once have had to seek this Court's review of the Maryland Court's order, he may not properly mount a collateral attack upon that order by challenging the District of Columbia court's judgment. In any event, as we understand the Maryland Court's order, Petitioner is free to seek reinstatement to active membership before the Maryland Court at any time. If he obtains a vacatur of the Maryland Court's order of suspension, he may apply for removal of his disability suspension in the District of Columbia. *See In re Chisholm*, No. 94-BG-818 (D.C. Mar. 7, 1995). Even if, as Petitioner maintains (Pet. 13), the Maryland Court's order placing him on inactive status arose in a contested rather than an uncontested proceeding, as the court below assumed, the distinction, without more, would not demonstrate that the court erred in imposing functionally identical discipline or that its judgment violates Petitioner's fundamental rights.

4. Petitioner's contention that he was denied a timely post-suspension hearing in the District of Columbia is without merit (Pet. 14). The order of the court of appeals placing Petitioner upon interim suspension following notice of the Maryland Court's action directed Petitioner to show cause before the Board within 30 days why reciprocal (*i.e.*, greater, lesser, or identical) discipline should not be imposed and further directed the Board to submit its recommendation to the Court concerning reciprocal discipline "promptly thereafter" (Pet. App. 6a). The Board's report and recommendation to the Court followed within three months (Pet. App. 37a). The Maryland Court's prior adjudication of Petitioner's inactive status provided ample constitutional warrant for the imposition of the interim protection of the public in the District of Columbia without need of an evidentiary pre-suspension hearing. *Cf. Gilbert v. Homar*, ___ U.S. ___ (U.S. June 9, 1997) (No. 96-651).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

*Leonard H. Becker
Bar Counsel

Michael S. Frisch
Senior Assistant Bar Counsel

Office of Bar Counsel
515-5th St., N.W., Room 127
Washington, D.C. 20001
(202) 638-1501

**Counsel of Record for Respondents District of Columbia Court of Appeals and District of Columbia Board on Professional Responsibility*

Dated: August 1997

STATUTES AND RULES

District of Columbia Code, Sec. 11-2502:

> "The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2502; June 13, 1994, Pub. L. 103-266, Sec. 1(b)(112), 108 Stat. 713.)

District of Columbia Court of Appeals Rule XI Governing the Bar, Sec. 11:

RECIPROCAL DISCIPLINE

(a) DEFINITION

As used in this section, "disciplining court" shall include any court of the United States as defined in Title 28, Section 451 of the United States Code, the highest court of any state, territory, or possession of the United States, and any other agency or tribunal with authority to disbar or suspend an attorney from the practice of law in any state, territory, or possession of the United States.

(b) NOTIFICATION

It shall be the duty of Bar Counsel to obtain copies of all orders of discipline from other disciplining courts. Upon learning that an attorney subject to the disciplinary jurisdiction of this Court has been disciplined by another disciplining court, Bar Counsel shall obtain a certified copy of the disciplinary order and file it with the Board and with this Court. In addition, any attorney subject to the disciplinary jurisdiction of this Court, upon being subjected to professional disciplinary action by a disciplining court outside the District of Columbia or by anther court in the District of Columbia, shall promptly inform Bar Counsel of such action.

(c) STANDARDS FOR RECIPROCAL DISCIPLINE

Reciprocal discipline shall be imposed unless the attorney demonstrates, by clear and convincing evidence, that:

(1) The procedure elsewhere was so lacking in notice or opportunity to be heard as to constitute a deprivation of due process; or

(2) There was such infirmity of proof establishing the misconduct as to give rise to the clear conviction that the Court could not, consistently with its duty, accept as final the conclusion on that subject; or

(3) The imposition of the same discipline by the Court would result in grave injustice; or

(4) The misconduct established warrants substantially different discipline in the District of Columbia; or

(5) The misconduct elsewhere does not constitute misconduct in the District of Columbia.

Unless there is a finding by the Board under (1), (2), or (5) above that is accepted by the Court, a final determination by a disciplining court outside the District of Columbia or by another court in the District of Columbia that an attorney has been guilty of professional misconduct shall conclusively establish the misconduct for the purpose of a reciprocal disciplinary proceeding in this Court.

(d) TEMPORARY SUSPENSION AND SHOW CAUSE ORDER

Upon receipt of a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been suspended or disbarred by a disciplining court outside the District of Columbia or by another court in the District of Columbia, the Court shall forthwith enter an order suspending the attorney from the practice of law in the District of Columbia pending final disposition of any reciprocal disciplinary proceeding, and directing the attorney to show cause within thirty days from the date of the order why the identical discipline should not be imposed. The attorney's response to the order to show cause shall be filed with the Board, which for good cause shown may extend the time for filing a response for a period not to exceed thirty days.

(e) RECOMMENDATION BY THE BOARD

Promptly after the attorney's response to the order to show cause is filed or, if no response is filed, promptly after the time for filing a response has expired, the Board shall recommend to the Court whether reciprocal discipline should be imposed. If no order to show cause has been issued, the Board shall recommend to the Court whether reciprocal discipline should be imposed promptly after receiving a certified copy of an order demonstrating that an attorney subject to the disciplinary jurisdiction of this Court has been subjected to professional disciplinary action, other than suspension or disbarment, by a disciplining court outside the District of Columbia or by another court in the District of Columbia. A copy of the Board's recommendation shall be served on the attorney. If the Board recommends to the Court that reciprocal discipline be imposed, the attorney may file with the Court, within thirty days after service of the Board's recommendation, an opposition to the recommendation stating specific reasons why the imposition of reciprocal discipline would be unwarranted.

(f) ACTION BY THE COURT

(1) When no opposition to the recommendation of the Board has been timely field, and when the Court does not direct that the matter be considered under paragraph (2) of this subsection, the Court will enter an order imposing the discipline recommended by the board upon the expiration of the time permitted for filing a opposition.

(2) In matters not falling under paragraph (1) of this subsection the Court shall impose the identical discipline unless the attor-

ney demonstrates, or the Court finds on the face of the record on which the discipline is predicated, by clear and convincing evidence, that one or more of the grounds set forth in subsection (c) of this section exists. If the Court determines that the identical discipline should not be imposed, it shall enter such order as it deems appropriate, including referral of the matter to the Board for its further consideration and recommendation.

(g) ACTION WHEN RECIPROCAL DISCIPLINE IS NOT RECOMMENDED

If the Board concludes that reciprocal discipline should not be imposed, it shall accept the facts found by the disciplining court unless it has made a finding under (1), (2), or (5) of subsection (c) of this section. In the absence of such a finding, the Board shall either: (Added (9/1/89)

(1) report to the Court its recommendation as to the appropriate discipline, or (Added 9/1/89)

(2) refer the matter to a Hearing Committee for its recommendation as to the appropriate discipline, or (Added 9/1/89)

(3) direct Bar Counsel to institute such proceedings as may be appropriate. (Added 9/1/89)

A copy of the Board's decision shall be served on the attorney. If the Board makes a recommendation to the Court under (1) above, the attorney may, within thirty days after service, file with the Court an opposition to the recommendation stating specific reasons why the imposition of reciprocal discipline would be unwarranted. If the Board makes a rec-

ommendation to the Court under (1) or directs Bar Counsel to institute proceedings under (3) above, Bar Counsel may, within thirty days after service, file with the Court exceptions to the decision of the Board. (Added 9/1/89)

(h) EFFECT OF STAY OF DISCIPLINE BY DISCIPLINING COURT

If at any time the discipline imposed outside the District of Columbia or by another court in the District of Columbia is stayed, any reciprocal discipline imposed by this Court or by the Board shall be deferred until the stay expires. (Added 9/1/89)